IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1525

ROBERT R. KAUFMAN,

Petitioner,

-against-

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD J. McLAUGHLIN
Attorney for Petitioner
32 Court Street
Brooklyn, N.Y. 11201
(212) 858-8080

ROBERT R. KAUFMAN
Co-Counsel for Petitioner
51 Chambers Street
New York, N.Y. 10007
(212) BA 7-6606

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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SUPREME COURT OF THE UNITED STATES
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v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed January 27, 1978, which affirmed two orders of the United States District Court for the Southern District of New York, both dated October 19, 1977 and entered October 21, 1977, which dismissed the complaint of the petitioner.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed in that Court on January 27, 1978, and it has not yet been officially reported. A copy of such opinion is printed beginning at page 4a of the Appendix herein.

The opinion of the District Court of the United States for the Southern District of New York, (Charles M. Metzner, J.) is dated October 19, 1977, and is printed in the Joint Appendix at page 115A. (9 copies submitted herewith).

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed January 27, 1978, is being timely made within 90 days of the filing of such judgment.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

No person *** shall be compelled in any criminal case to be witness against himself ***.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 *** nor shall any State deprive any person of life, liberty, or property, without due process of law; ***

QUESTIONS PRESENTED

1. Will our Supreme Court lend judicial assistance to avoid injustice in this case where it is documented by direct evidence?

2. Will this court decide the constitutional issues on the merits where the State Courts by order have stated they did not decide the same and where in effect they have refused to do so?

3. Will this court reaffirm its holding in the *Mooney v. Holohan* case 294 U.S. 103 and directly afford this petitioner review where the state court has without cause, refused to do so.

4. Has procedural due process been denied to petitioner?

5. Can coercion, letter documented, be allowed to stand uncorrected?

STATEMENT OF CASE

THE FACTS

Plaintiff was admitted to practice as an attorney and counsellor at law in the State of New York, on February 2, 1938. Disciplinary proceedings were instituted on June 12, 1962 by the filing of a petition containing charges of professional misconduct. A supplemental petition containing additional charges was filed, after Mr. Frank, then counsel to respondent, obtained plaintiff's papers and files pursuant to threats and his coercive letter of August 14, 1964, printed in the Joint Appendix (2nd Cir.) at page 10A, on November 17, 1964.

A hearing was held on the charges before a referee who was designated by specific order and who was empowered to hear only the specific charges, as referred to him. The referee's report was dated September 24, 1965 sustaining six of the nine charges filed against this petitioner. On February 3, 1966 the Appellate Division First Department confirmed the report of the referee (on motion) and ordered the petitioner disbarred from practice as an attorney and counsellor at law in the State of New York, effective March 3, 1966. After subsequent proceedings in the Appellate Division and court of appeals in which petitioner sought unsuccessfully to have reconsideration of the disbarment order, petitioner moved on March 10, 1967 for reopening of the disciplinary proceedings and suppression of certain evidence on the ground that he had been coerced into providing the committee on grievances of respondent with incriminating evidence in violation of the Fifth Amendment privilege against self incrimination.

On May 4, 1967, the appellate division denied petitioner's motion, and on July 7, 1967, the Court of Appeals, denied petitioner's motion for leave to appeal and

dismissed the appeal taken as of right.

NO HEARING WAS HAD IN ANY COURT other than the hearings before the referee recited supra.

NO APPEAL WAS HAD IN ANY COURT before this appeal to the Circuit Court of Appeals, Second Circuit.

On November 6, 1967 petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States claiming that the use of incriminating evidence and testimony obtained by respondent by coercion in the disciplinary proceedings violated petitioner's rights under the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to State action.

This petition was denied on January 15, 1968, but the Court advised:

> "The Court today entered the following order in the above entitled case (Robert R. Kaufman): No. 795 Oct. Term 1967. The petition for a writ of certiorari is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that Certiorari should be granted.
>
> John F. Davis, Clerk
> by C.T. Lydano"

On February 3, 1969 petitioner filed a petition in the appellate division for recall and reconsideration of the disbarment order of February 3, 1966 on the ground that his constitutional right to due process of law guaranteed by the Fourteenth Amendment was violated by the finding of the referee that he had made certain fraudulent assignments, although the charges in the disciplinary proceedings included no such specification. The finding with respect to fraudulent assignments occurred in connection with Charge No. 8 in the supplemental petition filed by the respondent herein. The order of reference to the referee did not submit or refer to him any such charge or specification. This charge contained allegations that petitioner converted to his own use his client's share of the

proceeds of the settlement of a claim for personal injuries, subsequently issued a check for his client's share of the settlement which was returned because of insufficient funds, and falsely represented to the counsel for the committee on grievances that the clients had agreed to lend petitioner their share of the settlement proceeds.

In connection with his finding with respect to this charge that petitioner had converted to his own use a share of the settlement proceeds due his clients, the referee made the further finding that, in an effort to hold off his clients, petitioner made assignments to them of obligations owing to him. The referee devoted several pages of his report to a discussion of these assignments (Referee's report, Joint Appendix submitted herewith, printed at page 102A) characterized these assignments as worthless (p. 102A Joint App.) and "fraudulent" (Id. at 105A, and found, as a result of the assignment that the petitioner engaged in a course of misconduct and acted in a fraudulent manner (*id* at 105A.)

Charge No. 8 in connection with which the referee made these findings and conclusions contained no allegations with respect to assignments or improper conduct in relation thereto, and no such charge was ever referred to him for determination.

The said assignment, which the referee found worthless, and fraudulent, though no charge or specification existed for the same, was upheld by the Supreme Court New York County, Frederick Backer, J., in May 1969, to the extent of $4969.24, (Joint App. pps. 12A, 13A, 14A.) submnitted herewith.

The opinion of the appellate division on the motion to confirm the referee's report upheld his finding with respect to charge No. 8 without comment on the finding with respect to fraudulent assignments.

Petitioner's motion to recall and reconsideration on the ground that his constitutional rights were violated

when he was found guilty of having made fraudulent assignments without any notice of such charge and without such charge having been made or existing was denied by the appellate division on March 25, 1969. On May 15, 1969, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal and dismissed his appeal taken as of right.

Petitioner was interrogated at Respondent's office by Mr. Frank, their attorney in 1961 and 1962, where he appeared at their direction.

At no time during Mr. Frank's interrogation was petitioner represented by counsel nor was petitioner advised of his rights.

Petitioner applied to the Appellate Division First Department on June 21, 1966 to amend the order of February 3, 1966, heretofore made, to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States. This motion was denied by order dated and entered July 7, 1966. (Appendix A, printed at p. 1a Petitioner applied to the Appellate Division for reconsideration of the February 2, 1966 order on October 8, 1975. This application for a new trial was based upon *newly discovered evidence*, namely Judge Backer's order, *supra*, sustaining the very assignment the Referee found fraudulent.

This application was denied by order dated *February 19, 1976*. Petitioner herein then applied for reconsideration and reargument of the motion for a new trial, on March 16, 1977 and for a new trial. This application was denied. Petitioner then moved in the Court of Appeals on May 16, 1977 for an order granting leave to appeal from the order of the Appellate Division dated March 28, 1977. On July 13, 1977 this application was denied.

Petitioner at all times before the State Courts raised the Federal Constitutional questions. Petitioner on the motion in the Appellate Division for a new trial returnable

October 8, 1975 raised the federal constitutional question, and he did so on the motion for a new trial returnable March 16, 1977. Both these motions were denied, supra. Petitioner duly raised the Federal constitutional question on the motion in the Appellate Division to amend the order of February 2, 1966, to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States. This motion was denied by order dated July 7, 1966. The petitioner recited his federal constitutional deprivations in his complaint before the United States District Court (Complaint annexed to Joint Appendix submitted P2A par. 2, P3A par. 3, P4A par. 3, P5A par. 3, P6A par. 4, par. 5, par. 6, P7A par. 7, par. 9, P9A, par.(3)(a).

REASONS FOR GRANTING THE WRIT

1. The United States District Court Charles M. Metzner J., found that plaintiff there, Petitioner here, raised the Federal Constitutional questions, in all the State Court proceedings. (Pg. 115A Joint Appendix Par. 2). The State Courts refused to pass on the constitutional (Federal) questions. (Order of App. Div. July 7, 1966, supra.)

Our courts have held, that the refusal to pass upon the federal question is just as reviewable as an express decision on the point. (Stern & Grossman-Supreme Court Practice, Third Edition P95 lines 10 & 11.)

Since the federal constitutional questions were raised in the motions for a new trial as well (supra) review should be granted. Chicago B & Q R. Co. v. Chicago, 166 U.S. 226, 23; -2/

2. Respondent's coercive demands, in the course of its investigation of petitioner's fitness to continue as a member of the bar, that petitioner furnish documents and information pertinent to possible disciplinary charges confronted petitioner with the alternative of providing his

accuser with inculpatory evidence with respect to possible disbarment or being disbarred for his refusal to do so. Our adversary system of justice safeguarded by the constitution prohibits placing a person in such a dilemma. (Resp. letter of August 14, 1964 (Jt. App. p. 10A)).

Punishment cannot be imposed for refusal to furnish incriminating information in reliance upon the privilege. *Spevack v. Klein* 385 U.S. 511; *Griffin v. California*, 380 U.S. 609. And, if incriminating information is furnished under threat of punishment for refusal to supply it, the information so coerced is not available for use as evidence in a criminal case. *Garrity v. New Jersey*, 385 U.S. 493.

In *Garrity v. New Jersey*, 385 U.S. 493 several officers were questioned in connection with an investigation by the Attorney General of New Jersey into alleged ticket fixing. Each officer was warned that anything he said could be used against him in any criminal proceeding and that his Fifth Amendment privilege applied but that his refusal to answer any questions would subject him to removal from office under New Jersey Rev. Stat. Sections 2A; -17. (Supp. 1965).

Under the circumstances the officers answered the questions and some of their answers were then used in criminal prosecutions of them. The officers were convicted in the state courts despite the officers objections that the convictions in large part were based on statements which had been coerced. In reversing the convictions the Supreme Court noted:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their jobs or means of a livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent." Id. at 497.

The court further noted that "where the choice is

between the rock and the whirlpool; duress is inherent in deciding to waive one or the other. "Id. at 498, and the court concluded, there was no voluntary waiver of the privilege.

In *Spevack v. Klein* 385 U.S. 511, appellant a lawyer, was called upon to produce records and to testify in a disciplinary proceeding then pending against him but refused to do so on the basis that the production of the records and his testimony might tend to incriminate him. He was subsequently disbarred.

The Court found that the threat of disbarment with the concommitant loss of professional standing and livelihood was coercive and held that the lawyer, like the policeman in *Garrity*, could not be forced to choose between self incrimination and loss of employment or professional standing. Id. at 516.

In a concurring opinion Justice Fortas distinguished between the lawyer and a public employee but held that the lawyer's rights were to be sustained.

In accord with the above holdings by the Supreme Court are *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation men v. Sanitation Commissioner*, 392 U.S. 280 (1969) and *Lefkowitz v. Turley*, 414 U.S.70 (1973).

The pronouncement in the *Garrity*, *Gardner* and *Spevack* cases was reaffirmed in the *Lefkowitz v. Cunningham* case decided by this court on June 13, 1977, No. 76-260.

3. Petitioner was denied procedural due process in violation of the Fourteenth Amendment because the disbarment order of February 3, 1966, was predicated, in parts on a finding of misconduct of which petitioner had no notice. The applicability to disciplinary proceedings of the due process notice requirement was established by this Court's decision in *In Re Ruffalo*, 390 U.S. 544.

In the Ruffalo case the court noted "the charge (No. 13) for which petitioner stands disbarred was not in the original charges made against him" 390 U.S. at 549. "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer, * * * He is accordingly entitled to procedural due process which includes fair notice of the charge." 390 U.S. 550. The court observed further that "These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence." 390 U.S. at 551. The opinion concluded that "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

The referee's finding that petitioner made fraudulent assignments to deceive a client is obviously relevant to his suitability to continue as a member of the bar. It must be assumed therefore, that the finding had a bearing on the determination that disbarment was an appropriate disciplinary measure. The fact that the finding was not identified as a separate charge does not weaken its effect. Nor does the fact that it was considered in connection with another charge render notice of that charge fair notice with respect to the fraudulent assignments finding. The charge that petitioner had appropriated his client's share of settlement proceeds, which petitioner claimed had been loaned to him, was wholly independent of petitioner's subsequent assignment to the clients of obligations due him by third parties. The referee's findings with respect to the former were made independently of his findings with respect to the assignments. Similarly, the Appellate Division in confirming the referee's report made a finding with respect to the charge involved independently of any

reference to the subsequent assignments. The finding with respect to the subsequent assignments, therefore, can only be regarded as a prejudicial finding concerning a separate matter with respect to which petitioner had no notice. As the Court noted In Re Gault, 387 U.S. 133,

> "Notice to comply with due process requirements, must be given sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

The Court's decision in Ruffalo establishes that this notice requirement is applicable to disciplinary proceedings. Since the Referee found that petitioner had made fraudulent assignments, although he had been given no notice of any such charge, the court below should have granted petitioner's motion for reconsideration and a new trial. Its failure to apply the decision of this court in Ruffalo warrants review by this Court.

4. The Constitutional Issues have not been decided by any Court. There is no res judicata. There has been no Appellate Review of the determination of the Appellate Division. The Appellate Division has denied leave to appeal and so has the Court of Appeals of the State of New York. No opinions for such denial have been handed down.

This court has repeatedly stated that a denial of certiorari is not an adjudication on the merits and has no res judicata effect. *Brown v. Allen*, 344 U.S. 433, 457-458, 73 S. Ct. 397, (1953); Id. 344 U.S. at 491-492. 73 Sup. Ct. 397 (opinion of Frankfurter, J. concurring) *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181.

> Similarly, the New York Court of Appeals has held that denial of leave to appeal is discretionary and is not equivalent to a decision on the merits. Matter of Marchant v. Meade-Morrison Mfg. Co. 252 N.Y. 284, reargument denied 253 N.Y. 534 appeal dismissed, 282 U.S. 808.

Thus neither the state courts nor the Supreme Court have decided the constitutional issues.

In *Lombard v. Board of Education of the City of New York*, 502 F. 2d at 635-636, the Court thus held that neither the Rooker case nor the doctrine of res judicata would bar this action.

Where a party has been denied a hearing, as in the case at bar, the court will not invoke res judicata. (Lombard v. Board of Education, supra).

The issues in this action as raised by the complaint (Jt. App. P2A-9A) are not the same as the issues that were decided in the State Court, the parties are not the same. The Circuit Court erroneously assumed that the issues were all passed upon. Since the order of the Appellate Division of July 7th, 1966 establishes that the constitutional issues were not passed upon and hence not determined, res judicata does not apply.

5. In paragraph 5 of the complaint (Jt. App. Pg 6A) plaintiff there and petitioner here alleges that Counsel to the Respondent withheld vital information from the referee and failed to disclose the same to the Appellate Division. Petitioner claims that such withholding of material evidence constitutes a denial of due process. This issue was never determined by any tribunal. The facts are that Mr. Frank had information long before the disciplinary hearings that petitioner claimed his client loaned him the funds in question. Mr. Frank failed to disclose this to the Referee and allowed him to find in his report that Kaufman blurted interest out at the hearing for the first time, in effect to cover himself.

Instead of informing the Appellate Division that he had this information, Mr. Frank allowed this grievous error

on the part of the referee to continue and he moved to confirm the referee's report before the Appellate Division.

In *People v. Riley*, 83 N.Y.S. 2d 281, brought 12 years after a defendant was disbarred on a conviction arising out of the said case the court granted an application of defendant and vacated the judgment of conviction on the finding that he was deprived of a fair trial by the District Attorney withholding evidence.

In *People v. Steele*, 65 N.Y.S. 2d 214, 222 a judgment of conviction was reversed where there was a withholding of material testimony or evidence by the prosecution which would or might have caused a different result, as in the case at bar.

In the case of *Lyons v. Goldstein*, 290 N.Y. 19 the Court of Appeals held it was within the inherent power of the court to set aside the conviction where the judgment was based upon fraud, trickery, deceit, coercion or misrepresentation.

In *Mooney v. Holohan*, 294 U.S. 103 this court held:

> the safeguards of due process should be present not only at the inception of a trial and maintained throughout the proceedings, but should be carried along into post trial practice.

This Court has insisted that each state provide some adequate remedy whereby a post trial procedure is available to test the legality of a conviction even though it appears proper on the surface, so that:

> "questions of fundamental justice protected by the due process clause may be used, to use the lawyer's language, dehors the record."

The examination of the case cited in the light of the due process clause points to the necessity of a remedy in the state courts whereby errors in fact which do not appear on the record and hence not subject to review on appeal can be reviewed without having to invoke a federal jurisdiction.

This the state courts did not afford and hence this Federal action (*supra*) was commenced. This was never determined, and hence there is no res judicata.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD J. McLAUGHLIN
Attorney for Petitioner

Robert R. Kaufman
Co-Counsel

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter
of
ROBERT R. KAUFMAN,
An Attorney.

S I R :

PLEASE TAKE NOTICE that the within is a copy of an order duly made in this proceeding and duly entered and filed in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, First Department, on the 7th day of July, 1966.

Dated: New York, July 11, 1966.

Yours, etc.,

JOHN G. BONOMI
Attorney for The Association
of the Bar of the City
of New York
36 West 44th Street
New York, N.Y. 10036

TO:
Robert R. Kaufman, Petitioner
Appearing Pro Se
51 Chambers Street
New York, N.Y.

APPENDIX B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 7th day of July, 1966.

Present—
Hon. BERNARD BOTEIN,
CHARLES D. BREITEL,
HAROLD L. STEVENS,
SAMUEL W. EAGER,
ARON STEUER,

Justices

In the Matter
of
Robert R. Kaufman,

An Attorney.

The above-named petitioner, Robert R. Kaufman, having moved this Court for an order staying the operation and effect of the order of disbarment of this Court, entered on February 3, 1966, effective March 3, 1966, and for a further order amending the order heretofore made to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States; and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Robert R. Kaufman, duly sworn to the 17th day of June, 1966 and the 21st day of June, 1966, in support of said motion, and the affidavit of Michael Franck, duly sworn to the 20th day of June, 1966, in opposition thereto, and after

hearing Mr. Robert R. Kaufman, appearing pro se, for the action, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed,

It is ordered that the said motion be and the same hereby is denied.

ENTER:

FRANK H. CRABTREE
DEPUTY CLERK.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-eight.

Present:
HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD
HONORABLE WILLIAM H. MULLIGAN,
Circuit Judges.

ROBERT R. KAUFMAN,
Plaintiff-Appellant,

-v.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant *pro se* and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said

District Court dismissing appellant's complaint be and it hereby is affirmed. In this action brought under 42 U.S.C. §1983, appellant seeks to overturn the order of disbarment issued against him by the Appellate Division, First Department, on February 3, 1966. During the nearly twelve years that have since passed, he pursued numerous appeals within the New York State courts. The due process and Fifth Amendment claims now before us were raised during these appeals, and the United States Supreme Court denied certiorari on these claims. Under these circumstances, we follow this Court's previous decision in *Turco v. Monroe County Bar Ass'n.*, 554 F 2d 515 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3216 (Oct. 3, 1977), and find that appellant's action is barred by the doctrines of res judicata and collateral estoppel.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge.

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ William H. Mulligan
WILLIAM H. MULLIGAN,
Circuit Judges.